STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELISIO GALVIN,

Defendant-Appellant.

UNPUBLISHED
June 14, 2007

No. 264598
Wayne Circuit Court
LC No. 05-002561-01

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right from his convictions for assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, being a felon-in-possession of firearm, MCL 750.224f, and using a firearm in the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

While defendant was in jail awaiting his trial, he called Geraldine Suell on a telephone in the jail. Suell lived with defendant's father and characterized herself as defendant's "stepmother." The telephone calls were recorded in accord with jail policy. In the recorded calls, defendant suggested two people that he wanted to testify that he was somewhere else when the shooting occurred. Suell told defendant that she did not think the two people would testify and she offered, as his "stepmother," to testify that he was with her on the day of the shooting. Defendant also told Suell that he had told his attorney that he was "there," presumably meaning at the scene of the shooting.

Before trial, the prosecutor moved to add Suell to the witness list. The motion was argued on the first day of trial. The prosecutor argued that Suell would establish both motive and consciousness of guilt because her testimony and the record calls would show that defendant had suborned perjury by asking Suell to present a false alibi defense. Defendant objected because the endorsement was late and because Suell's testimony would only be relevant if defendant raised an alibi defense, which he did not. The court deferred its ruling until the third day of trial, when it granted the motion, ruling that Suell's testimony would provide evidence of defendant's attempt to fabricate an alibi. Defense counsel moved for a mistrial, which the trial judge denied.

Before the third day of trial, Suell approached one of the jurors outside the courthouse and told her that defendant was innocent and that the police were trying to frame him. All the

jurors either heard or heard about Suell approaching a juror and asserting his innocence. After the judge was informed, he questioned the jurors. The jurors all said that they could disregard what they saw or heard. Defense counsel moved for a mistrial, arguing that Suell's actions had tainted the jurors, and that the taint would only increase if Suell were still allowed to testify. The trial judge denied the motion and allowed Suell to testify.

Suell testified that she was not with defendant on the day of the shooting, and that she would not have lied under oath for him. On cross-examination, Suell testified that she did not know that an alibi defense would be offered, that defendant had not asked her to be an alibi witness, that her suggestion to provide defendant with an alibi was "misguided," and that although defendant said that he was "there," he did not say that he was the shooter. The recorded jail conversation was also played for the jury, and the trial court instructed the jury on the issue of false alibi.

Defendant argues on appeal that the court abused its discretion and denied him a fair trial when, over a defense objection and motion for mistrial, it permitted the late endorsement of Suell and admitted her testimony even after she had approached a juror and had asserted defendant's innocence. Defendant contends that because of the close relationship between defendant and Suell the jurors could think that defendant and Suell acted together to improperly influence the jury and to provide a false alibi for defendant. We disagree.

This Court reviews the admission of evidence and the late endorsement of a witness for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). To show an abuse of discretion the decision must have fallen outside the range of possible reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). Evidence that has any tendency to establish a fact of consequence in resolving a dispute is relevant and, therefore, admissible. MRE 401, 402. However, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, the evidence must be excluded. MRE 403. Unfair prejudice occurs when a jury will give undue or preemptive weight to marginally probative evidence. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

Suell's testimony established that defendant admitted to his attorney that he was at the crime scene during the shooting. Therefore, Suell's testimony was at least relevant in establishing that fact of consequence. However, Suell's testimony does not indicate that she and defendant agreed to influence the jury by having Suell approach the jury and protest defendant's innocence or that they together actually agreed to concoct a false alibi. In fact, Suell's testimony establishes that she offered to provide a false alibi and not that defendant asked her to provide a false alibi. Thus, Suell's testimony tends to undermine defendant's appellate claim that the jury would conclude on the basis of Suell's testimony that Suell and defendant colluded to influence the jury or to concoct a false alibi. Further, there is simply no indication that the jury gave undue or preemptive weight to Suell's testimony. The evidence that defendant was the shooter was fairly strong. Two fellow members of the Latin Counts, who were also implicated in the shooting as the driver of the vehicle and as the supplier of the gun, testified that defendant was the shooter. Thus, we conclude that the trial court did not abuse its discretion in admitting this evidence because it had a basis in fact and law and did not unfairly prejudice defendant.

Defendant notes that it is impermissible to inform a jury that a defendant abandoned an alibi defense. *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989); *People v Dean*, 103 Mich App 1, 7; 302 NW2d 317 (1981); *People v Shannon*, 88 Mich App 138, 143; 276 NW2d 546 (1979). Defendant argues that the trial court violated his constitutional rights when it admitted evidence, through Suell's testimony and the recorded telephone calls, that defendant discussed procuring possible alibi witnesses for his trial even though defendant did not raise an alibi defense. We disagree.

This Court reviews evidentiary rulings for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A defendant is not required to proceed with an alibi defense after filing a notice of an alibi defense. *Dean*, *supra* at 6-7. Therefore, informing the jury of a defendant's failure to produce an alibi witness where the defendant had given notice of an alibi defense "unduly denigrates defendant's case when he later chooses to present no evidence." *Shannon*, *supra* at 143. In *Holland*, *supra* at 190, this Court reasoned that it is improper for the prosecution or the trial judge to comment on the defendant's previous notice of an alibi defense when the defendant later decides to present no alibi evidence because it "is tantamount to shifting the burden of proof by allowing the jury to make adverse inferences from defendant's or the alibi witness's failure to testify." In *Dean*, *supra* at 6, this Court held that "it is reversible error for the trial court and the prosecutor to comment on defendant's failure to produce an alibi witness." See also *Shannon*, *supra* at 142-143.

However, a prosecutor may challenge an alibi defense by commenting on the defendant's failure to produce corroborating witnesses after the defendant has actually put forth an alibi defense. *Shannon*, *supra* at 145; *Holland*, *supra* at 190. In this case, defendant never filed a notice of an alibi defense. Rather, defendant and Suell merely discussed the possibility of obtaining alibi witnesses. According to the recorded telephone calls, Suell offered to perjure herself and testify that defendant was with her. The record shows that defendant did not specifically ask Suell to do this, but it also shows that defendant wanted to procure witnesses who would say that he was with them and not at the shooting. Although Suell and defendant's discussion about procuring false alibi testimony may be as consistent with innocence as with guilt, the evidence may be considered by the jury as evidence of the consciousness of guilt. *People v Ranes*, 58 Mich App 268, 272; 227 NW2d 312 (1975). Because defendant told Suell that he admitted to his attorney that he was at the shooting, the jury could consider defendant's discussion with Suell about procuring a false alibi witness as an attempt to procure perjured testimony reflecting a consciousness of guilt.

This case differs from a prosecutor commenting on a defendant's decision not to present an alibi defense after giving notice of intent to do so, which implicitly shifts the burden of proof to present evidence onto defendant, as prohibited by *Shannon*, *Holland*, and *Dean*. Here, the prosecutor merely commented on defendant's discussion with Suell about procuring alibi witnesses as probative of defendant's consciousness of guilt, as permitted by *Ranes*. Accordingly, the trial court did not abuse its discretion by permitting the late endorsement of Suell or by admitting her testimony and the recorded calls about procuring false alibi testimony.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio